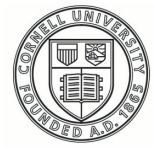

September 1994

Executive Summary of the Testimony of American Nurses Association, et al. Before the Commission on the Future of Worker-Management Relations

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Hot Topic
"Future Worker Management"

EXECUTIVE SUMMARY

Testimony of

AMERICAN NURSES ASSOCIATION
BLACK WOMEN UNITED FOR ACTION
BUSINESS AND PROFESSIONAL WOMEN/USA
CENTER FOR ADVANCEMENT OF PUBLIC POLICY
CENTER FOR WOMEN POLICY STUDIES
CHURCH WOMEN UNITED
CLEARINGHOUSE ON WOMEN'S ISSUES
COALITION OF LABOR UNION WOMEN
FUND FOR THE FEMINIST MAJORITY
MANA, A NATIONAL LATINA ORGANIZATION
NATIONAL ASSOCIATION OF WORKING WOMEN
NATIONAL CENTER FOR THE EARLY CHILDHOOD WORKFORCE
NATIONAL COMMITTEE ON PAY EQUITY
OLDER WOMEN'S LEAGUE
WIDER OPPORTUNITIES FOR WOMEN
WOMEN EMPLOYED INSTITUTE
WOMEN'S LEGAL DEFENSE FUND
WOMEN WORK!
YWCA OF THE U.S.A.

submitted to

COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS

September 29, 1994

Presented by:

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With:

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Women's Legal Defense Fund

Nancy B. Kreiter, Research Director
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INTRODUCTION

On behalf of a diverse group of organizations representing women across all sectors of the labor force, we are again pleased to testify before the Commission on the Future of Worker-Management Relations. As you know, the women's equity community is broad based, and represents national membership organizations, legal and policy advocacy groups, policy research organizations, and grass-roots groups working for the betterment of women.

There are three guiding principles which are essential to any acceptable system of alternative dispute resolution. First, it must provide a proper balance of power between the employer and the employee. Second, accountability to society at large is essential for fairness to the employee and for building appropriate incentives for employers to institute equitable employment practices. Third, the structure of the system must have enough integrity and continuity to encourage use by all parties.

Drawing on our considerable expertise and extensive research[1], we have reached two broad conclusions: (1) more effort should be put into enforcement of anti-discrimination laws and into prevention of discrimination and its attendant complaints, and (2) the reason for the continuing growth in employment complaints merits extensive, serious review by this Commission since it places a substantial burden on all parties involved and also directly impacts the mission(s) of a number of public enforcement agencies.

ISSUES AND RECOMMENDATIONS

I. Prevention of complaints through removal of the cause of complaints should be the first priority of the Commission in addressing dispute resolution.

[1] Our testimony is limited to workplace disputes arising from unlawful employment discrimination based on sex, since that is the area of expertise for most of our member organizations. We would urge the Commission to consult other experts for their recommendations about how to strengthen public enforcement of laws in other areas of employment disputes (e.g. minimum wage, overtime, employee benefits law and the like).

To date, the Commission has given insufficient attention to the fact of discrimination in the workplace, focusing instead on inconvenience to the employer in dealing with non-meritorious cases. While we acknowledge that some non-meritorious cases are inevitable in a nation of more than 128 million workers, we ask the Commission to remember that the greatest source of discrimination complaints is discrimination. We believe that the question of dispute resolution can best be addressed by first looking at how to prevent workplace disputes. Insofar as female employees are concerned, these disputes most often center around sex discrimination in hiring, discharge, pay and promotion, and on sexual harassment, including hostile working environments. Enforcement agencies, most especially the EEOC, have a large backlog of cases and are presently lacking both staff and funding necessary to effectively deal with the ongoing flood of complaints. Therefore prevention of complaints should be a priority for the Commission, taking precedence over ways to deal with resolution of complaints once they occur.

Recommendations:

- ***Give employees easier access to unions.*** We believe this is crucial for decreasing the level of conflict in the workplace, thereby decreasing the number of complaints. The Commission finds that only 45 percent of nonunion firms have some form of employee grievance procedure, in contrast to 98 percent of all unionized firms, and further finds that "in most workplaces with collective bargaining, the system of labor-management negotiations works well. Conflict is relatively low, and unions and firms have developed diverse forms of cooperative arrangements." (p. 64, *Fact Finding Report*)

- ***Remove the caps on damages for sex discrimination in the 1991 Civil Rights Act by passing the Equal Remedies Act now before Congress.*** These caps have the effect of establishing a "fee schedule" for discrimination. When the *expected value* of discrimination is higher than the *expected value* of an occasional fine, employers conclude that it is cheaper to discriminate and pay an fine of known amount (a mere cost of doing business) than to correct discriminatory practices.

- ***Make enforcement of existing laws tougher.*** It is generally recognized that the anti-regulatory environment of the 1980s produced an atmosphere of lax enforcement of employment laws. Some employers undoubtedly responded to this environment with decreased attention to practices that lead to worker complaints, particularly where no union was present to monitor such activities. Employers are less likely to discriminate if they know they will be punished.

- ***Require increased disclosure of employment statistics.*** Employers are able to learn virtually everything about the employee, but employees often cannot get the most basic information about employment practices. This information imbalance directly addresses the Commission's question as to how the level of trust and quality of the relationships among workers, labor leaders, managers, and other groups in society and the workplace can be enhanced.

II. In equal employment opportunity disputes that cannot be prevented, the government's role should be to facilitate enforcement of laws and quick resolution with a publicly administered system; an option to consider is publicly administered voluntary ADR through existing enforcement agencies. We do not recommend, and indeed would oppose the Dunlop Commission's proposing at this time that any new, private, system of resolving employment disputes be created, or establishment of any mandatory public system of ADR.

We believe statements in the Commission's *Fact Finding Report* support this view. The women's equity and civil rights communities have fought for 30 years for the protections afforded by our employment laws and the public agencies to administer and enforce those laws. The fact that the mechanism for enforcement has been starved for lack of resources and deliberately undermined by explicit policies while having enforcement responsibility significantly increased does not serve as evidence that a new system should be created, but rather that existing systems should be given the resources to function effectively.

We strongly oppose expanded use of mandatory arbitration in the equal employment opportunity law context. The Supreme Court recognized twenty years ago, in *Alexander v. Gardner-Denver*, the preeminent role of federal courts in determining issues of liability and relief under Title VII, and the general unsuitability of the arbitral procedures for resolving

discrimination disputes. *Gilmer* notwithstanding, nothing has changed in the nature of arbitration since *Gardner-Denver* that renders arbitration a more suitable vehicle for resolving discrimination disputes. The government should never give its imprimatur to employers to coerce individual workers, particularly women workers who are not protected by a union, to choose between agreeing to ADR and their jobs. We have other significant concerns about the effect of private, non-union ADR on employees' ability to vindicate their EEO rights, even in cases where it is not compelled as a condition of employment.

Recommendation:

We support, and recommend that the Commission support, legislation similar to the bills recently introduced by Representative Schroeder and Senator Feingold that make it illegal for employers to obtain voluntary or involuntary arbitration agreements before a dispute arises and that makes unenforceable pre-dispute arbitration agreements to resolve employment discrimination claims.

III. Public systems exist for enforcement of employment law, and these system have the potential to greatly reduce the number of workplace complaints as well as facilitate the handling of complaints that do arise. Unlike private ADR systems in non-union settings, these systems have both accountability and continuity.

The Commission should explore:

- *Increasing the amount and specificity of information submitted on the EEO forms, such as including wages by employment category, gender, and race.*

- *Devoting resources at the Equal Employment Opportunity Commission to targeting systemic discrimination and bringing class actions, thereby reducing the number of workplace violations and attendant complaints.*

- *Instituting mechanisms for collaboration and cooperation between agencies.*

- *Eliminating the backlog by restructuring and re-examining processes at the EEOC, and continue to experiment with and evaluate alternative methods of resolution of EEOC charges.*

- *More aggressive public education programs.*

- *An improved quick-response system for tracking cases and case disposition.*

- *Increasing funding for and use of city, state and county civil and human rights commissions.*

- *Build on the new, aggressive enforcement policy that has recently been put in place at the Office of Federal Contract Compliance Programs.*

Recommendation:

We recommend that Congress appropriate sufficient funds for public agencies to function in accordance with their mandates to end employment discrimination. Recognizing that the government must operate in a fiscally responsible manner, such appropriation would save billions of dollars lost by employees to discriminatory practices, and save a like amount in litigation costs for both employees and employers.

IV. Since private companies are free to create alternative dispute resolution systems as they choose, it is important that basic protections be mandated for employees when such systems are created and used, and that abuses in such systems be sharply curbed. We believe that employees pursuing EEO claims through such systems should be able to preserve their right to seek redress through legal channels should private ADR fail to safeguard their rights.

In the matter of constructing a workable and fair private non-union ADR system, we believe the inherent power imbalance between the employee and employer may be a fatal flaw. For example, there is no obvious solution to the question of who pays for the services of the ADR practitioner. If the employee is required to pay an equal share with the

employer, the cost may be prohibitive. If the employer is required to pay the full share or even most of the cost, the practitioner may be biased in favor of the deeper pockets of the employer. Similar problems arise in the question of who chooses the ADR professional, and by what method.

Any dispute resolution system relied upon or subject to review by an enforcement agency such as the EEOC must have built-in procedures for monitoring outcomes, to ensure not only that these safeguards are met but also that the agency's mission to end employment discrimination is fulfilled.

Recommendation:

To protect against abuse and to safeguard the rights of the employees who are using ADR, we urge the Commission to propose adoption of a series of limitations on ADR, whenever it is used in the EEO context. If resolution of a case through ADR does not contain these safeguards, it should be unenforceable. These safeguards should be adopted by Congress and used by the EEOC and other enforcement agencies to evaluate privately arrived at settlements of employment discrimination disputes.

CONCLUSION

ADR, particularly in a private, non-union context, is too complex to fully explore in a short period such as the Commission's current life. We recommend that the Commission continue its exploration of ways to resolve conflict in the workplace with emphasis on enhancing the public systems that are already in place. We support public agency, private employer, union, and public interest sector collaboration on these issues. We believe it is important that advocates for women, who are now the majority of Americans, be included in any continuing exploration of these issues. We believe we can make a valuable contribution, and we would like to be included in any continuing work or working group on ADR.